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See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

GABRIEL FRANCISCO VASQUEZ,

Appellant.

2 CA-CR 2007-0363

DEPARTMENT B

MEMORANDUM DECISION

Not for Publication

Rule 111, Rules of
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20063968

Honorable Edgar B. Acuña, Judge

AFFIRMED

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Tucson
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E S P I N O S A, Judge.

¶1 A jury found Gabriel Vasquez guilty of aggravated driving under the influence of an intoxicant (DUI) and aggravated driving with “an alcohol concentration” of .08 or more while his license was suspended. He was convicted and sentenced to concurrent 4.5-year prison terms. On appeal, he contends the trial court erred in rejecting his challenge to the prosecutor’s use of peremptory strikes during jury selection, in denying his motion for a judgment of acquittal, and in instructing the jury on the statutory presumption of impairment for a blood alcohol concentration (BAC) of .08 or higher. For the reasons stated below, we affirm.

Factual and Procedural History

¶2 We view the facts in the light most favorable to sustaining the jury’s verdict. *State v. Cox*, 217 Ariz. 353, ¶ 22, 174 P.3d 265, 269 (2007). In October 2006, a witness called police after he and a friend had observed Vasquez “driving erratic” at about 2 a.m. They followed Vasquez’s car and watched it “swerve[] back and forth,” “hit the median” twice, and emit “sparks” when a tire was damaged. They continued following the car to a parking lot, where Vasquez attempted to change the tire.

¶3 While Vasquez was changing the tire, several Tucson police officers arrived and approached him. During this encounter, Vasquez was “irate” and exhibited physical symptoms of intoxication including watery, bloodshot eyes; swaying; slurred speech; and a strong odor of alcohol. As the officers were speaking to him, Vasquez attempted to flee on foot but was apprehended while trying to climb a barbed wire fence. He then refused to

submit to chemical testing. The officers transported Vasquez to Kino Hospital where he admitted that he had been drinking and driving. An officer secured a telephonic search warrant, and a sample of Vasquez's blood was drawn at 5:30 a.m. Subsequent analysis of the sample revealed a BAC of .169.

Discussion

Batson Challenge

¶4 Vasquez first argues the trial court erroneously denied his challenge, brought pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986), to the state's use of peremptory strikes to remove three prospective jurors who were Hispanic. "*Batson* held that using a peremptory strike to exclude a potential juror solely on the basis of race violates the Equal Protection Clause of the Fourteenth Amendment." *State v. Newell*, 212 Ariz. 389, ¶ 51, 132 P.3d 833, 844 (2006). Vasquez argues the denial of his *Batson* challenge was clearly erroneous and reversible error.¹

¹In addition to his reliance on *Batson*, Vasquez also makes several passing references to "federal and state equal protection and impartial jury guarantees." However, he does not develop any arguments beyond his *Batson* claim, and thus we do not consider them on appeal. See Ariz. R. Crim. P. 31.13(c)(vi) (appellant's brief must contain argument with citations to authority); *State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 n.9 (2004) ("[O]pening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised," and "[f]ailure to argue a claim usually constitutes abandonment and waiver of that claim."), quoting *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989).

¶5 During jury selection, Vasquez challenged the state’s peremptory strikes of three Hispanic jurors, V., L., and R.² The state immediately offered its reasons for the three strikes. Regarding V., the prosecutor explained V. “never looked up at me. He looked bored and not happy to be here. I didn’t think he would be good on the jury for the week.” The prosecutor also noted V.’s wife was a nurse, and she “generally prefer[red] not to have nurses or their relatives on [the] jury panel when . . . an officer perform[ed] a blood draw” Finally, the prosecutor said she struck V. because his brother-in-law “had a DUI,” which made her “nervous because he’s been through the DUI system on the other side.”

¶6 As to L., the prosecutor stated he was quiet and she “didn’t feel like he was going to be able to put forth his opinion. He looked like he would be easily overrun by other jurors and that made [her] nervous.” She further explained, “He seemed very eager to agree when asked questions, and I really felt that he would just follow whatever the group of jurors w[as] doing. And of the remaining jurors, I thought that he would be a problem because I didn’t feel like he could hold his own ground.”

¶7 Regarding R., the prosecutor stated he was “[a]lso a quieter member of the jury. I thought he made eye contact with defense counsel but didn’t make eye contact with me and that also made me nervous.” She also noted that “as a [UPS] driver who is on the road a lot, he may have an increased likelihood of driving under the influence,” which made

²Vasquez also challenged the state’s peremptory strike of another juror, C. The state explained that C. was stricken because he was being prosecuted for DUI by the prosecutor’s office. Vasquez does not appeal the denial of his *Batson* challenge as to C.

her “worry about leaving him on the jury.” Last, she stated that “the amount of eye contact I was getting from him” made her think he “had already sort of moved in one direction.”

¶8 After the prosecutor explained her reasons for the strikes, Vasquez’s counsel argued that striking prospective jurors for a lack of eye contact violated *Batson* because “[c]ultural studies have been done on the Hispanic population, and one of the things that Hispanics are known for is that they do not look people directly in the eye.” Therefore, she argued, “the State has used a factor that is known to exist in the Hispanic community to hold against them and to take them off the jury.” The trial court found the state’s explanations race neutral and denied Vasquez’s *Batson* challenge.

¶9 A *Batson* challenge involves three steps. First, a defendant must make a prima facie showing that a peremptory strike was based on race. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the prospective juror. Third, the trial court must determine, in light of the parties’ submissions, whether the defendant has shown purposeful discrimination. *Snyder v. Louisiana*, ___ U.S. ___, ___, 128 S. Ct. 1203, 1207 (2008); *State v. Gay*, 214 Ariz. 214, ¶ 17, 150 P.3d 787, 793 (App. 2007).

¶10 “On appeal, a trial court’s ruling on the issue of discriminatory intent must be sustained unless it is clearly erroneous.” *Snyder*, ___ U.S. at ___, 128 S. Ct. at 1207. Vasquez advances several reasons why the court incorrectly denied his *Batson* challenge.³

³Because the state volunteered an explanation for its peremptory challenges, “the preliminary issue of whether [Vasquez] . . . made a prima facie showing [of discrimination] is moot.” *State v. Rodarte*, 173 Ariz. 331, 333, 842 P.2d 1344, 1346 (App. 1992).

He first argues that, although the prosecutor “stated that she observed the jurors being quiet and not looking up at her,” there is no indication in the record these observations were accurate. Vasquez also contends, without citation to authority, that “studies demonstrate that the Hispanic population is known for not engaging in direct eye[]contact and for being culturally quiet.” Finally, in a supplemental brief,⁴ Vasquez argues the first time the court was required to conduct “a comparative analysis of similarly situated jurors” in which it “comparatively analyze[d] the jury voir dire and the questions and answers of all venire members, not just those stricken.” Therefore, Vasquez contends, the court reversibly erred in failing to make “a record of other jurors that may not have looked at the prosecutor, whose relatives were nurses, whose relatives had DUI’s, or who were quiet.”

¶11 We first address Vasquez’s contention that the record fails to support the prosecutor’s claims that the challenged jurors were quiet and did not make eye contact with her. This claim is unpersuasive because the trial court was able to assess the credibility of the prosecutor’s explanations, as well as observe the jurors themselves, and was not required to make specific findings on the record as to whether a juror did or did not make eye contact with the prosecutor or was quiet. As the United States Supreme Court recently explained,

The trial court has a pivotal role in evaluating *Batson* claims. Step three of the *Batson* inquiry involves an evaluation of the prosecutor’s credibility, and “the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge.” In addition, race-neutral reasons

⁴We granted Vasquez’s motion to file a supplemental brief based on new case law.

for peremptory challenges often invoke a juror's demeanor (*e.g.*, nervousness, inattention), making the trial court's first-hand observations of even greater importance. In this situation, the trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. We have recognized that these determinations of credibility and demeanor lie "'peculiarly within a trial judge's province,'" and we have stated that "in the absence of exceptional circumstances, we would defer to [the trial court]."

Snyder, ___ U.S. at ___, 128 S. Ct. at 1208 (citations omitted) (alterations in *Snyder*).

¶12 Here, the trial court was required to "evaluate the sincerity of the prosecutor as well as the behavior of the jurors." *Gay*, 214 Ariz. 214 at ¶ 19, 150 P.3d at 794. "These are credibility determinations that the court was in the best position to make," *id.*, and Vasquez offers no authority that would require the court to make specific findings on the record as to particular details such as lack of eye contact. *Cf. Rodarte*, 173 Ariz. at 334, 842 P.2d at 1347 (refusing to require trial court to corroborate on the record prosecutor's statements about lack of eye contact or boredom).

¶13 Moreover, we find no error in the trial court's finding the prosecutor's reasons for striking these prospective jurors to be race neutral. *See, e.g., Gay*, 214 Ariz. 214, ¶¶ 18-19, 150 P.3d at 793-94 (state's reason for striking prospective juror, which included lack of eye contact with prosecutor, was facially race neutral); *Rodarte*, 173 Ariz. at 333-34, 842 P.2d at 1346-47 (state's reasons for striking juror, including juror's appearing bored, looking around, and not making eye contact, properly deemed race neutral); *State v.*

Hernandez, 170 Ariz. 301, 305-06, 823 P.2d 1309, 1313-14 (App. 1991) (state’s reasons for striking prospective juror, including juror’s enthusiastic mode of answering questions and perceived sympathy toward defendant, were permissible bases for peremptory strike).

¶14 We next address Vasquez’s contention, also raised for the first time on appeal, that the court committed reversible error by failing to “comparatively analyze the jury voir dire and the questions and answers of all venire members, not just those stricken.” Vasquez claims this procedure is mandated by *Batson* as set forth in *Green v. LaMarque*, 532 F.3d 1028 (9th Cir. 2008). However, we read *Green* differently. *Green* provides that the court’s inquiry “*may* include a comparative analysis of the jury voir dire and the jury questionnaires of all venire members.” *Id.* at 1030 (emphasis added). Accordingly, even were we required to follow *Green*, which we are not, *see State v. Swoopes*, 216 Ariz. 390, ¶ 35, 166 P.3d 945, 956 (App. 2007), *Green* would not require reversal here.⁵

⁵We do not read *Green* to require trial courts to undertake such an analysis, and we decline to adopt such a requirement here. When criticizing the trial court’s failure to undertake a comparative analysis of similarly situated jurors, *Green* cited two Supreme Court cases: *Batson*, 476 U.S. at 93, and *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005). *Green*, 532 F.3d at 1030-31. But neither case requires a trial court to conduct a comparative juror analysis. Rather, *Batson* held that, “[i]n deciding if the defendant has carried his burden of persuasion, a court must undertake ‘a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.’” 476 U.S. at 93 (citation omitted). And, significantly, the Court further stated, “We decline . . . to formulate particular procedures to be followed upon a defendant’s timely objection to a prosecutor’s challenges.” 476 U.S. at 99. Likewise, although the Court in *Miller-El* conducted a comparison of several prospective jurors, 545 U.S. at 241, it did not hold that trial courts are required to perform such a comparison, let alone that a failure to do so constitutes reversible error.

¶15 Moreover, even were we to conduct a comparative juror analysis on appeal, the Supreme Court has warned that “a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial” and “an exploration of the alleged similarities at the time of trial might have shown that the jurors in question were not really comparable.” *Snyder*, ___ U.S. at ___, 128 S. Ct. at 1211; *see also Hernandez*, 170 Ariz. at 305, 823 P.2d at 1313 (“The dynamics of the jury selection process make it difficult, if not impossible, on a written appellate record to evaluate or compare the challenge of one prospective juror with the retention of another person who on paper appears to be substantially similar.”).

¶16 Furthermore, even if such an analysis were required, we could not conduct one in this case because the record fails to establish the race or ethnicity of any prospective jurors other than the three Vasquez challenged.⁶ Accordingly, a comparative analysis at this stage would not yield any relevant evidence of racial discrimination. *Cf. Gay*, 214 Ariz. 214 at ¶¶ 21-27, 150 P.3d at 794-95 (comparing, as part of *Batson* review, responses of prospective African-American jurors stricken with those of non-African-Americans seated as jurors). Although Vasquez asserts the prospective jurors identified in his supplemental brief were Caucasian, he provides no citation to the record and instead merely submits that, “[although] these jurors did not state on the record that they were Caucasian, they were.” Vasquez’s bare

⁶We note the court stated only that the prospective jurors at issue had “Hispanic surnames.”

assertion is an insufficient substitute for an actual record establishing the other jurors' ethnicity. *See* Ariz. R. Crim. P. 31.13(c)(iv), (vi) (requiring appellant's brief to provide record citations for evidence considered on appeal); *State v. Zuck*, 134 Ariz. 509, 512-13, 658 P.2d 162, 165-66 (1982) ("It is the duty of counsel who raise objections on appeal to see that the record before us contains the material to which they take exception. Where matters are not included in the record on appeal, the missing portions of the record will be presumed to support the action of the trial court.").⁷

¶17 In short, based on the record before us, we find no facts or law supporting a conclusion that the trial court clearly erred in denying Vasquez's *Batson* challenge.

Judgment of Acquittal

¶18 We next address Vasquez's argument, made for the first time on appeal, that "[t]he trial court erred by failing to grant a directed verdict of acquittal on the BAC charge because the state failed to produce evidence that Vasquez's BAC was over .08 within two

⁷We do not address Vasquez's claim that "studies demonstrate that the Hispanic population is known for not engaging in direct eye[]contact and for being culturally quiet." At the outset, we need not reach this issue because, as set forth above, none of the three prospective jurors was stricken solely for being quiet or not making eye contact. Moreover, apart from his vague reference to "studies," Vasquez has provided no authority or supporting argument that would allow us to consider this contention on appeal. *See* Ariz. R. Crim. P. 31.13(c)(vi); *Moody*, 208 Ariz. 424 at n.9, 94 P.3d 1119 at 1147; *see also State v. Jaeger*, 973 P.2d 404, 410 (Utah 1999) ("[T]his court is not 'a depository in which the appealing party may dump the burden of argument and research.'"), *quoting State v. Bishop*, 753 P.2d 439, 450 (Utah 1988).

hours [of] the time of driving.”⁸ A “trial court has no duty to order an acquittal where there is substantial evidence that a defendant has committed the crime charged, and a directed verdict should not be granted if the evidence is such that reasonable minds may differ on the inferences to be drawn therefrom.” *State v. Paoletto*, 133 Ariz. 412, 416, 652 P.2d 151, 155 (App. 1982).

¶19 At trial, the state’s toxicology expert testified about the blood test results and described the process by which the human body processes and eliminates alcohol. She stated that, on average, a person has finished absorbing alcohol and entered the “elimination” phase, during which BAC begins to decline, an hour after his or her last drink. She gave no specific testimony regarding Vasquez’s BAC within two hours of driving. At the close of the state’s evidence, Vasquez moved for a directed verdict, arguing the state had not proved he was the driver of the car. The court denied the motion.

¶20 When police do not determine a defendant’s BAC until more than two hours after the defendant drove a vehicle, the state may meet its statutory burden of proving the defendant’s BAC within two hours of the time of driving by using scientific evidence to relate the BAC back to the relevant time. *See State v. Claybrook*, 193 Ariz. 588, ¶ 14, 975

⁸Vásquez has changed theories regarding his Rule 20 motion for acquittal. At trial, he argued the state had not proven he was the driver of the vehicle, an issue he has abandoned on appeal. When an appellant fails to raise an issue in the trial court, he forfeits the right to obtain appellate relief in the absence of fundamental error. *State v. Hamblin*, 217 Ariz. 481 n.2, 176 P.3d 49, 51 (App. 2008). However, because “a conviction based on insufficient evidence is fundamental error,” we consider his new argument raised for the first time on appeal. *Id.*

P.2d 1101, 1103 (App. 1998). However, the state also can present sufficient evidence of a defendant's BAC within two hours of driving even without relation-back evidence. *See State v. Panveno*, 196 Ariz. 332, ¶ 29, 996 P.2d 741, 745 (App. 1999) (police testimony, defendant's admissions, and results of later blood test sufficient to support jury's finding defendant's BAC was .10 or more at time of driving).

¶21 Here, one of the eyewitnesses testified he had observed Vasquez driving erratically and bumping the median with his car, causing "sparks."⁹ Additionally, three different officers testified Vasquez had exhibited physical symptoms of intoxication including watery, bloodshot eyes; a strong odor of alcohol; swaying while standing; and slurred speech. Furthermore, Vasquez admitted to one officer that he had in fact been drinking and driving that evening.

¶22 Finally, while the state's toxicology expert did not specifically relate Vasquez's .169 BAC at 5:30 a.m. back to his BAC within two hours of driving, she discussed the way alcohol is processed by the body and explained the average person will enter the "elimination" phase an hour after the person's last drink, and his or her BAC will begin to decline. Because Vasquez was no longer consuming alcohol during the approximately 3.5-hour period between the time the police first contacted him and the time his blood was

⁹Vasquez claims the witness's testimony was "discredited." The credibility of witnesses, however, is a matter for the finder of fact, *see State v. Hickie*, 129 Ariz. 330, 331-32, 631 P.2d 112, 113-14 (1981), and, as stated above, we view the facts in the light most favorable to sustaining the jury's verdict. *See Cox*, 217 Ariz. 353, ¶ 22, 174 P.3d at 269.

drawn, the jury could infer Vasquez had been in the elimination phase for at least two and one-half hours. Thus, based on the testimony of the officers and the toxicologist as well as the evidence of his 5:30 a.m. BAC of .169, there was ample evidence for the jury to conclude that Vasquez had had a BAC of .08 or greater at the time of driving. *See Panveno*, 196 Ariz. 332, ¶ 29, 996 P.2d at 745.

Jury Instruction

¶23 Finally, we address yet another argument Vasquez raises for the first time on appeal, that the trial court erred in instructing the jury it could presume he had been driving under the influence of intoxicating liquors if the state established his BAC to have been .08 or higher at the time. Because he failed to object to the jury instruction at trial, we review only for fundamental error. *See State v. Gomez*, 211 Ariz. 494, ¶ 25, 123 P.3d 1131, 1137 (2005). Vasquez asserts, “In order for the statutory presumption to apply . . . the state must properly present breath test evidence . . . within two hours of driving.”¹⁰ Because the state did not present relation-back evidence, he argues, it did not meet this burden. However, in *State v. Gallow*, we explicitly held that “[n]othing in the statute requires the introduction of evidence relating the BAC results back to the time of driving,” and a court does not err by giving “the presumption instruction without relation-back testimony.” 185 Ariz. 219, 221, 914 P.2d 1311, 1313 (App. 1995). As we explained, although a defendant’s BAC is

¹⁰Although Vasquez makes several references to “breath tests,” as the state notes, the only evidence of Vasquez’s BAC was the result of blood analysis, and no breath test was performed.

“probative evidence that he was impaired, the state still had to establish, and the jury still had to find, that he was ‘impaired to the slightest degree.’” *Id.*, quoting former A.R.S. § 28-692(A)(1), predecessor to A.R.S. § 28-1381(A)(1). Thus, it was not error, much less fundamental error, to instruct the jury on this presumption even in the absence of specific relation-back testimony. *Id.* Moreover, as noted above, the state presented sufficient evidence of intoxication to support the jury’s verdict.

Disposition

¶24 For the foregoing reasons, Vasquez’s convictions and sentences are affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

JOHN PELANDER, Chief Judge